United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-7418

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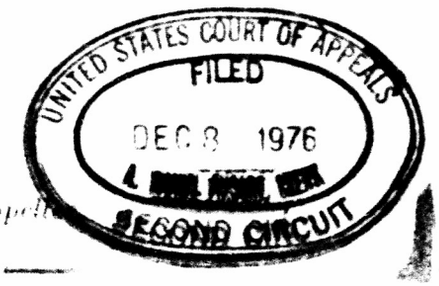

ELIZABETH C. MONROE,
Plaintiff-Appellee,

against

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, Trustees of the Property of PENN CENTRAL TRANSPORTATION COMPANY, Debtor,
Defendant-Appellant.

BRIEF OF PLAINTIFF-APPELLEE.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1976

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UNITED STATES COURT OF APPEALS

For the Second Circuit

ELIZABETH C. MONROE,

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Defendant-Appellant.

BRIEF OF PLAINTIFF-APPELLEE

Preliminary Statement

This is an appeal from a final judgment entered in the office of the Clerk of the United States District Court for the Southern District of New York on July 30th, 1976 in favor of the plaintiff, Elizabeth C. Monroe, and against Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees

of the Property of the Penn Central Transportation Company, Debtor, for the sum of $25,000.

Trial was had before Honorable Marvin E. Frankel, United States District Court Judge, and a jury, in the United States District Court for the Southern District of New York on July 26th, 27th and 28th, 1976, and the jury returned a verdict for $25,000 in favor of plaintiff, Elizabeth C. Monroe, against Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of the Penn Central Transportation Company, Debtor.

The action was brought to recover a sum in excess of $10,000 on behalf of plaintiff, Elizabeth C. Monroe, as a result of personal injuries sustained by her at Penn Station, New York City on April 13th, 1975. The action was originally brought in the Supreme Court of the State of New York, County of New York, and removed to the United States District Court for the Southern District of New York, upon the petition for removal of the defendants on the ground of diversity of citizenship.

In her complaint, plaintiff alleged negligence against the defendant Penn Central Transportation Company in the ownership, operation, management, maintenance and control of an

escalator known as the B-7 escalator located in the said Penn Station and connecting a portion of the main concourse with the platform for tracks 12 and 13 at Penn Station.

The case went to the jury on the issue of the negligence of the defendant Penn Central Transportation Company in the ownership, operation, management, maintenance and control of the escalator known as the B-7 escalator.

THE FACTS

Plaintiff was injured at Penn Station in New York City when a descending escalator on which she was riding malfunctioned. (A137, 168-169, 226-228)

The probable cause of the malfunction was slippage or binding of the left handrail (i.e., "left" as one descends on the escalator) causing it to stop or slow down as the steps kept descending. (A92, 120, 150-155, 168, 220-221, 226-228)

As a result, the plaintiff, a 78 year-old widow who had been holding on to the left-handed railing, was pulled back and off balance, and twisted counter-clockwise. (A168-169)

The combination of these forces resulted in a trimalleolar fracture of her right ankle. (A137, 168-169, 231, 304)

The escalator's malfunction was not unlike that observed by the defendants' employees on prior occasions (A92-94, 120-124) and both the reasons for the malfunction and the way to prevent it were explained by Otis Elevator personnel who manufactured the escalator. (A150-154, 431-452)

Defendants admit ownership, management, maintenance

and control of the offending escalator (known as B-7) (A9a, 11a, 28) and had even installed the handrail thereof themselves. (A117-118, 124-125, 158)

Defendants make no claim that the plaintiff did anything to cause or contribute to the escalator's malfunction and have insisted throughout the trial that they have no idea what caused the accident and have never initiated an investigation to determine the cause thereof. (A17, 46, 48, 140, 263, 336, 337, 345)

The Trial Court charged the jury that for the plaintiff to recover she must satisfy it, inter alia, "that the accident happened in substantially the way her evidence describes." (A386)

Defendants do not contest the amount of the jury's verdict (A412-413, Notice of Appeal) or argue that it is not fully supported by the evidence.

Instead they insist that plaintiff could have been found contributorily negligent and that the Trial Court committed reversible error in not charging the jury in accordance with Lewis v. Baker, 526 F2d 470 (2nd Cir. 1975).

All plaintiff was doing during the few seconds she was on the escalator (A171-172) was standing still (A169) and holding on to the left-handed railing with her left hand, with a small suitcase and her pocketbook in her right hand. (A133, 168-170, 215-216)

Plaintiff was wearing low, wide-healed shoes; (A175-176) and she did not trip; (A176) she was not pushed; (176) her knees did not lock or buckle; (A224-225) and she was not weak or dizzy. (A176) Nor was there any evidence of these things to the contrary.

Plaintiff had never seen or experienced an escalator malfunction such as occurred here. (A176) In the second it took for the entire episode to occur, (A171, 210, 222, 227-229) plaintiff wasn't sure if

A. The handrail had stopped or slowed and the steps kept descending;

B. The steps had speeded up;

C. The handrail had reversed itself; OR

B. Both the handrail and steps had reversed with the steps moving slower than the handrail.

(A168-169, 175-176, 206-216, 221-231)

Defendants claim it was contributorily negligent for plaintiff to hold on to the handrail once the malfunction occurred. The flaw with that argument is that the malfunction and the injury occurred so close together in time as to be virtually simultaneous. Plaintiff was asked at trial,

> Q. And when the railing started to go back, what did you do?
>
> A. I stood still because I couldn't move. My foot was hurt by that time. (A227)

Plaintiff's foot was broken the moment the handrail stopped. (A227) If she had somehow managed to release the handrail in that it second, she would probably have fallen and broken her h - or worse - as well, and defendants would be saying she was contributorily negligent for not holding on.

Defendants were permitted during trial to prove and argue that the offending B-7 escalator was operating properly the day before the accident, (A256-259, 461, 275, 326-327, 358, 359, 364) at the time of the accident, (A272-273, 327-328, 354, 357, 359, 360) and immediately afterwards. (A320, 331, 356, 357, 359, 364)

If the jury had accepted the defendants' proof and

arguments and rejected the plaintiff's, there would have been a defendants' verdict. If they accepted the plaintiff's and rejected the defendants', then there was going to be a plaintiff's verdict, and defendants' ADDITIONAL REQUEST TO CHARGE (A414-415) would not have made the slightest difference.

We agree with the observation of the Trial Court at the end of the entire case that, "there is not a shred of evidence" "with respect to contributory negligence"; (A348-349) and that the charge in Lewis v. Baker 526 F2d 470 (only half of which was requested by defendants)(A414-415) is more an argument to a jury than a controlling principle of law. (A349)

ARGUMENT

POINT I

THERE WAS NO ISSUE OF CONTRIBUTORY NEGLIGENCE TO SUBMIT TO THE JURY

New York law, in this diversity case, is that contributory negligence "is not always for the jury." "It should not be charged, notwithstanding that plaintiff has the burden of proof, when there is no or insufficient evidence to support a finding that plaintiff was negligent." 1 NY PJI 2d 172

In Willis v. Young Men's Christian Association, 28 N.Y. 2d 375, 321 N.Y.S. 2d 895 (1971) the New York Court of Appeals stated (P. 378) the law applicable hereto:

> "It is the general rule that contributory negligence should not be charged "if there is no or insufficient evidence to support it." (65 C.J.S. Negligence §293, P. 1032)
>
> Where plaintiff is in fact free from contributory negligence it is not error to refuse to instruct and submit to the jury on this subject. (Bernard v. Bohanan, 203 Va. 372, 124 S.E. 2d 191)

In Willis, plaintiff, a 13-year-old girl, was attending a YMCA "indoor sleep-in" to which young people had been invited for a small fee. When "sack time" came, plaintiff bedded down

on the floor "about one foot from the wall and one foot from the girl next to her." (P. 377) As one of the counselors was taking a pillow from a shelf mounted on the wall nearest the plaintiff, the plastic arm of a chair, which had been underneath the pillow on the shelf, fell off the shelf onto the plaintiff, injuring her. The main issue on the appeal was whether plaintiff, who was apparently not yet sleeping when the accident occurred, had been free from contributory negligence as a matter of law. The Court unanimously held she was.

The case is clearly analogous to the matter at Bar, because had 13-year-old Deborah Willis moved out of the way of the falling chair arm she might not have been injured. Having failed to move out of the way of the falling chair arm, she was struck and injured.

In the case at Bar, appellants say: "Having failed to release the handrail, plaintiff was pulled backwards and injured." (P. 12 of appellant's brief)

If the agile 13-year-old in Willis was free from contributory negligence as a matter of law, how could this 78-year-old plaintiff in Monroe be any less so? Mrs. Monroe

had about as much time and opportunity to prevent her injury as Deborah Willis did.

Absent some specific activity or inactivity on the plaintiff's part which actually causes the accident, New York Courts have consistently held it error to submit contributory negligence to a jury in airplane cases (Gillman v. Liberty Airport Auth., 32 A.D. 2d 296, 300, 302 Supp. 2d 203, 206); automobile cases (Paul v. Paul, 41 A.D. 2d 560, 339 N.Y.S. 2d 901 [2nd Dept., 1973]; Meyer v. Brown-Harter Cadillac Inc., 32 A.D. 2d 1045, 303 N.Y.S. 2d 746 [2nd Dept., 1969]; Middleton v. Levy, 33 A.D. 2d 1015, 308 N.Y.S. 2d 212 [1st Dept., 1970] aff'd 27 N.Y. 2d 788, 315 N.Y.S. 2d 852); and general negligence cases (Parisi v. Lombardi, 41 A.D. 2d 560, 339 N.Y.S. 2d 965).

The Braun case (Braun v. Consolidated Edison Co., 31 A.D. 2d 165, 169, 296 N.Y.S. 2d 61 [1st Dept., 1968], aff'd 26 N.Y. 2d 825, 309 N.Y.S. 2d 356 [1970])cited on page 18 of appellants' brief is not inapposite to the cases cited herein. Appellants' cited Braun for the proposition that a res ipsa loquitur charge cannot be given unless accompanied by a contributory negligence charge. Such a principle is overbroad and is not justified by the remainder of the language therein. It is only "where reasonable inferences would support a finding that the negligence

of an injured...may have contributed to his injury...[that] the issue of contributory negligence is properly submitted to the jury." Braun, 296 N.Y.S. 2d 61, 65.

In Braun, plaintiffs' intestates were working on a high-voltage switch box. They had the opportunity to de-energize the switch box before commencing work but voluntarily chose not to. In rejecting plaintiffs' claims that contributory negligence should not have been submitted to the jury, the Appellate Division stated,

> Such dismissal would amount to an unjustifiable matter of law holding that the decedents incurred no danger in working on the switch-box without the de-energizing of cables. Furthermore, the dismissal would have constituted a factual determination that the explosion was caused not by acts of the decedents relating to danger incurred by them, but by events which occurred outside of the substation and which were under the control of Con Ed.
>
> .....
>
> As noted, the cause of the accident was not established and we do not know whether the explosion was triggered by events occurring in or outside of the substation. 296 N.Y.S. 2d 61, 65.

The Braun plaintiffs not only failed to prove their intestates' freedom from contributory negligence as a matter of

law or fact, they even failed to prove a prima facie case against the defendant and defendant's motion to dismiss at the end of the plaintiffs' case, said the Appellate Division, should have been granted. 296 N Y.S. 2d 61,66.

In the case at bar, there is no claim that plaintiff did anything to cause the escalator's malfunction; that she assumed any risk, that res ipsa loquitur was not applicable; or that specific allegations of negligence and causes of the malfunction were not proven.

It is a general proposition in New York law that if a person riding in or on a conveyance is injured while he is doing that which he is supposed to be doing, he may not, as a matter of law, be charged with contributory negligence. Andre v. Pomeroy, 35 N.Y. 2d 361, 365, 362 N.Y.S. 2d 131, 134 (1974).

P O I N T II

IT WAS NOT REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY DEFENDANTS' ADDITIONAL REQUEST TO CHARGE

Defendants concede that they were given every opportunity to prove that the B-7 escalator worked properly before, during and after plaintiff's injury. (P. 21 of appellant's brief)

Defense counsel argued on summation what conclusions should be drawn from that evidence. (A356-360)

The additional charge requested by the defendants would have added nothing to defendants' case.

In Lewis v. Baker 526 F 2d 470 (1975), an F.E.L.A. case, the trial court instructed the jury,

> that if the brake operated properly before the accident, that the jury might "presume that the functioning would have continued... at the time of plaintiff's accident," and that if the brake was found to be functioning normally and properly when it was later inspected by the train master and gang foreman, that they might "infer or conclude.... it would have operated normally and properly at the time of the accident, and, therefore, was not defective." (474)

.....

> If you find there was failure of the handbrake owing to unexplained reasons as distinguished from a known or explainable condition, then it is not material that the handbrake performed properly at another time. (475)

"Thus, it was made clear to the jury that if they believed defendants' evidence, they might infer continuance forward and back; but if they believed plaintiff's testimony, then the prior and subsequent condition of the brake was not material." (475)

The additional charge requested by the appellant herein was incomplete. It contained only the first half of the Lewis charge and was, therefore, a deficient statement of the law which the Trial Court was entirely justified in denying.

Item (b) of defendants' additional request to charge is defective because it asks the Court to tell the jury what the evidence established. It is for the jury to determine what the evidence established - not the Court; and it was improper for counsel to request the Court to instruct the jury what to find.

Even if defendants had properly requested the entire principle of law enunciated in Lewis v. Baker, the Trial Court would have been justified in declining to so charge. The point

had been amply covered by the Court when it instructed the jury (at A386) that,

> In order to prove liability...the plaintiff must have satisfied you on two subjects: First, that the accident happened in substantially the way her evidence describes, and, second, that it was the defendants' negligence which was a proximate cause, in the legal expression, of that accident.

While Lewis v. Baker may be a correct statement of the law (475), it is a principle of logic and common sense, a subject adequately covered by the Court in its charge to the jury. (A397)

For the jury to have found for the plaintiffs in this case, it must have found "that the accident happened in substantially the way her evidence describes." If it did, then the inference to be drawn from Lewis v. Baker regarding the prior and subsequent condition of the B-7 escalator was not material. (475) If it didn't believe the accident happened in substantially the way plaintiff said it did, than it was duty-bound to bring in a defendants' verdict, and no help from Lewis v. Baker was needed. Lewis v. Baker could not, in any way, have affected the outcome of this trial.

It is one thing to hold that the giving of a particular

charge is not error. It is quite another to hold that it must be given. Lewis is authority for the proposition that the giving of the "presumption of continuance" charge is not error. It is not authority for the proposition that it must be given.

CONCLUSION

The judgment in favor of the plaintiff should be affirmed, with costs, to appellee.

Respectfully submitted

FUCHSBERG & FUCHSBERG
Attorneys for Plaintiff-Appellee

NORMAN LEONARD COUSINS

Of Counsel

Service of three (3) copies of
the within is
hereby admitted this 7th day
of December, 1976

Attorney for